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No. 94-1921

In the Supreme Court of the United States

OCTOBER TERM, 1995

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether "proffers" that a landowner submits to a county, in order to induce that county to rezone a tract of land, are "property" of the county for which the United States must pay just compensation when it acquires the tract from the landowner by eminent domain.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 48 F.3d 520. The opinion of the United States Claims Court (now the Court of Federal Claims)[1] dismissing petitioner's claim (Pet. App. 47a-87a) is reported at 23 Cl. Ct. 205. The opinion

[1] This action was commenced in the United States Claims Court. Pet. App. 47a. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, renamed that court "Court of Federal Claims." For convenience, we will use the trial court's new name to refer to proceedings held and decisions rendered by it and its predecessor.

of the United States Claims Court denying petitioner's motion for reconsideration (Pet. App. 39a-46a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1995. The petition for a writ of certiorari was filed on May 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The William Center Tract is a 550-acre property adjacent to the Civil War battlefield at Manassas, in Prince William County, Virginia. In 1986, the owner of the tract (the landowner) submitted "proffers" to petitioner, the Board of County Supervisors of Prince William County, to induce petitioner to rezone the tract from agricultural to Planned Mixed Use (permitting a mixture of commercial, office, and residential uses). Under Virginia law, "proffers" are commitments made by a developer to a zoning authority in order to mitigate anticipated development impacts. The landowner's proffers in this case included, among other things, providing for open spaces, community trails, and recreation facilities, undertaking certain road improvements (or compensating petitioner for their construction), contributing to the funding of local public schools, and providing five acres for a fire station and a commuter parking lot or other public facility. Petitioner granted the landowner's request to rezone the tract for development. Pet. App. 4a-7a, 48a-52a.

When the landowner proposed to construct a much larger development on the tract than originally proposed, a citizens coalition persuaded Congress to

enact the Manassas National Battlefield Park Amendments of 1988, Title X of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 10002(2), 102 Stat. 3810, codified at 16 U.S.C. 429b(b). See Pet. App. 52a-53a. That Act vested in the United States, as an addition to the Manassas Battlefield National Park, all right, title and interest in and to, and the right to immediate possession of, the William Center Tract. The Act further obligated the United States to "pay just compensation to the owners of any property taken pursuant to this [Act] and * * * pledged * * * the payment of any judgment entered against the United States with respect to the taking of such property." 16 U.S.C. 429b(b)(2)(B).

2. The landowner and petitioner filed separate suits in the United States Court of Federal Claims (CFC) seeking compensation claimed to be due them. Petitioner sought $2 million for 16.05 acres of rights of way that had been conveyed to it. Petitioner also sought compensation for the proffers, alleging, *inter alia*, that the proffers constituted a property interest of which it was deprived as a result of Congress's decision to exercise its power of eminent domain. No value was assigned to the proffers. See Complaint ¶ 10.

The United States settled the developer's suit, but declined to pay petitioner for either the value of the proffers or the 16.05 acres of rights of way that had been conveyed to it in fee. On June 3, 1991, the CFC issued a partial summary judgment dismissing petitioner's claim relating to the proffers. Pet. App. 47a-87a. The court reasoned that Virginia law is clear that the effect of a proffer is not to create property rights in the zoning authority, but simply to incorporate the agreed-upon restrictions as part of

the zoning plan for the jurisdiction. *Id.* at 60a-61a. Because local zoning codes do not apply to property that is owned by the United States, the court concluded that the restrictions "simply ceased to exist as of the date of the taking; they were not taken." *Id.* at 61a, 83a-84a. The court also concluded that Virginia law did not support petitioner's claims that the proffers amounted to a "dedication" of property for public use (*id.* at 67a-70a), or that the proffers were equivalent to restrictive covenants (*id.* at 70a-78a).

On December 18, 1992, the CFC issued a second opinion dismissing the remainder of petitioner's suit (relating to the rights of way). 27 Fed. Cl. 339. The court reasoned that the proposed development at the William Center Tract will never take place and there is no longer any need for petitioner to build roads. Because petitioner failed to show that it could devote the rights of way that had been dedicated for use as public roads to other, more profitable uses, the court concluded that petitioner was entitled only to nominal compensation for that property.

3. Petitioner appealed both decisions, and the court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-38a. The court first held that proffers are neither contract rights nor analogous to a security interest, like a materialmen's lien. The court explained that petitioner's acceptance of the proffers was simply the exercise of delegated zoning authority under Virginia law, which could not fairly be "overla[id] * * * with a contract veneer" (*id.* at 17a), and noted that "[t]he object of the proffers in this case was not to give [petitioner] something of intrinsic value with which it could go into the market place and trade, or which it could use and possess for

county purposes" (*id.* at 20a-21a). Rather, "the proffers, when incorporated[,] as Virginia law provides[,] into the ordinance granting the rezoning, gave [petitioner] the power to enforce the ordinance as enacted. That power [petitioner] could not sell, give away, or transfer. Such enforcement rights arise out of and are defined by [petitioner's] exercise of the police power." *Id.* at 23a-24a. Accordingly, the court concluded that petitioner "did not 'own' any interests by virtue of the proffers," and that "[t]he trial court was correct in dismissing [petitioner's] claim regarding the proffers." *Id.* at 25a-26a.

The court of appeals reversed, however, the trial court's ruling with respect to the 16.05 acres that the landowner conveyed to petitioner for use as rights of way. Because that property was conveyed to petitioner by the landowner in fee simple, the court concluded, "[i]t matters not that the parties contemplated that the property would be used for a particular purpose." Pet. App. 32a. "[A]s a matter of property law," the court noted, petitioner "was free * * * to do with the property what it wished." *Id.* at 33a-34a. The court therefore remanded for a determination of the just compensation due petitioner for the taking of rights of way that it held in unencumbered fee simple. *Id.* at 38a.

ARGUMENT

The holding of the court of appeals on the narrow issue presented by petitioner—that proffers accepted by a Virginia local government in connection with rezoning do not constitute "property" within the meaning of the Fifth Amendment—is correct and does not conflict with a decision of any court of appeals or of this Court. Further review is not warranted.

1. While the meaning of "property" in the Fifth Amendment is a federal question, ordinarily federal courts look to local law to resolve whether rights amounting to "property" have been taken. *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 279 (1943). In this case, both courts below correctly concluded that nothing in Virginia law supports petitioner's claim that the proffers conferred property rights upon petitioner. That is because a local government's acceptance of proffers effects a legislative rezoning under Virginia law. See *Rinker* v. *City of Fairfax*, 381 S.E.2d 215, 217 (Va. 1989). Thus, once accepted, proffers simply become part of the zoning restrictions that apply to the property. Zoning is a non-compensable exercise of the legislative will, not "property" within the meaning of the Fifth Amendment. Moreover, as the Virginia courts have recognized, local zoning restrictions do not apply to property owned by the United States. See Pet. App. 83a-84a (citing *Washington & Old Dominion R.R.* v. *City of Alexandria*, 60 S.E.2d 40, 44 (Va. 1950)); see also 6 P. Rohan, *Zoning and Land Use Controls* ¶ 40.03(1)(a) (1995). The Court of Federal Claims was therefore assuredly correct in concluding that petitioner's zoning restrictions, including the proffers made by the former owner of the William Center Tract, "simply ceased to exist as of the date of the taking; they were not taken." Pet. App. 61a.

That analysis is not impugned by petitioner's claim that, by virtue of the proffers, it acquired valuable rights that it could have enforced against the owner of the property if the development had not been terminated by Congress's action. Pet. 30, 31, 38. This Court has repeatedly recognized that "the existence of value alone does not generate interests protected

by the Constitution against diminution by the government." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319 (1932). Indeed, in circumstances like those present here, where the claimed loss is simply a consequential injury from the condemnation of the property of another, this Court has long held that no compensation is due. That principle is illustrated by *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923), where this Court held that the United States was not liable to a third party for the frustration of a contract to purchase a large quantity of steel from a steel manufacturer at a favorable price when the government requisitioned the steel company's entire product for a year. "[F]or consequential loss or injury resulting from lawful government action," the Court said, "the law affords no remedy." *Id.* at 510. The Court went on to explain (*id.* at 511):

> In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended.

Similarly, in *Mitchell* v. *United States*, 267 U.S. 341 (1925), the government condemned land used by the plaintiffs in their business of growing and canning corn of a special grade and quality. After receiving just compensation for the value of their land, the plaintiffs filed suit for additional recovery for the loss of their canning business, which was destroyed because no other land in the vicinity was suitable for

growing high-quality corn. The Court, after noting that "settled rules of law" precluded consideration of "consequential damages" for losses of a business or its destruction, stated (267 U.S. at 345):

> No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.

And in *United States ex rel. T.V.A.* v. *Powelson*, *supra*, the Court held that the United States was not required to compensate a property owner for loss of its privilege to use the State's power of eminent domain to acquire several tracts together with the tract condemned to form a multiple-dam, hydro-electric plant project, explaining (319 U.S. at 281):

> This public project, to be sure, has frustrated respondent's plan for the exploitation of its power of eminent domain. We may assume that that privilege was a thing of value and that this frustration of the plan means a loss to respondent. But our denial of compensation for that loss does not make this an exceptional case in the law of eminent domain. There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment.

After adverting to its rulings in the *Omnia* and *Mitchell* cases, *id.* at 281-283, and reaffirming their rule on the non-compensability of consequential damages, the Court found "no reason based on precedent or principle * * * why respondent's privilege to use

the power of eminent domain should be treated as 'private property' within the meaning of the Fifth Amendment so as to give rise to a private claim against the public treasury." *Id.* at 283.[2]

As the lower courts correctly concluded, there is no reason for a different conclusion with respect to petitioner's exercise of its statutory zoning authority under Virginia law. Thus, far from creating "new Federal law * * * about what constitutes a compensable property interest" (Pet. 19), as petitioner contends, the result reached by those courts is completely consistent with the controlling decisions of this Court.

2. There is no merit to petitioner's contention (Pet. 14, 46) that the court of appeals' conclusion conflicts with *United States* v. *50 Acres of Land*, 469 U.S. 24 (1984), because it means that public condemnees are not entitled to similar treatment as private condemnees. In *50 Acres*, a municipality whose landfill was condemned by the United States argued that the government was required to pay it the cost of acquiring a substitute facility. The Court held that the municipality was not entitled to that measure of compensation (which concededly would have applied if the government had taken property for which there was no market, such as streets), because there was "a fairly robust market for sanitary landfill

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[2] Numerous other cases affirm the proposition that consequential damages that result from the taking of property by the federal government are not compensable under the Fifth Amendment even when, as petitioner asserts was the case here, the claimant has lost a valuable expectancy. See, *e.g.*, *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-378 (1946); *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94-95 (1933); *Bothwell* v. *United States*, 254 U.S. 231, 233 (1920).

properties." *Id.* at 30. That holding has no relevance to the court of appeals' ruling, which turned on petitioner's failure to meet a threshold requirement for compensation that applies equally to private and public condemnees—the taking of "property." The reason petitioner is not entitled to compensation for the loss of the proffers is not that it is being treated differently from private condemnees, but that it is being treated in the same manner as private condemnees who lose business opportunities and expectations as a result of a taking.

There is no greater force to petitioner's claim (Pet. 37) that the decision below is inconsistent with *Armstrong* v. *United States*, 364 U.S. 40 (1960). *Armstrong* held that the government's destruction of certain materialmens' liens was a compensable taking of property interests within the meaning of the Fifth Amendment. *Id.* at 44-46. Liens, however, generally give the holder the right "to resort to the specific property" for satisfaction of the claims they secure (*id.* at 44; see also *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 589-590 (1935)). By contrast, Virginia law provides only that the restrictions reflected in the proffers become part of the legislative rezoning of the tract. See Pet. App. 14a-15a, 17a, 60a. Petitioner's disagreement with that interpretation of Virginia law, in which both courts below concurred, does not merit this Court's review. Cf. *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976).[3]

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[3] Petitioner's alternative argument (Pet. 38-39), that the proffers were analogous to restrictive covenants, is also without merit. In Virginia, restrictive covenants are compensable property if taken by eminent domain. *Meagher* v. *Appalachian Electric Power Co.*, 77 S.E.2d 461, 465 (Va. 1953) (reviewing

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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authorities). To qualify as property, however, the benefit or burden must "run with the land." 5 R. Powell, *The Law of Real Property* ¶ 673[2] (1994); see *Net Realty Holding Trust* v. *Franconia Properties*, 544 F. Supp. 759, 762 (E.D. Va. 1982). Because of the lack of the requisite privity of estate between petitioner and the developer, the Court of Federal Claims correctly found that the proffers were more closely akin to affirmative covenants, which are created when the covenantor promises to perform an act upon his land which benefits land owned by the covenantee. See C. Clark, *Real Covenants and Other Interests Which "Run With Land"* 97, App. I (2d ed. 1947) at 213-232. In Virginia, the burdens of affirmative covenants do not run with the land. See, *e.g.*, *Tardy* v. *Creasy*, 81 Va. 553, 562 (1886).